

**Supplemental Submission by JUSTICE, the Hong Kong Section
of the International Commission of Jurists**

on

The United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

1. This submission supplements the previous JUSTICE submission to the Bills Committee dated 29th October 2003. Attached for ease of reference are alternative draft amendment provisions, founded on those proposed by JUSTICE in its submissions on the original Bill in June 2002, which provide minimalist implementation of the UN and FATF resolutions.
2. JUSTICE repeats §7 of its October submission. The definition of “terrorist act”, which also founds the definitions of “terrorist” and “terrorist property” at the core this legislation, urgently requires amendment. In particular, that definition must be amended so as to require the specific intention to cause an outcome listed in subsection (a)(i). At present only the disruption outcomes (E) and (F) are required to be intended. See proposed alternative drafts of Clause 2 attached.
3. JUSTICE maintains its objection to the use of the Court in the existing s.5 to validate a political decision to specify a person or group of persons as “terrorists”. This provision violates the constitutional principle of the separation of powers. JUSTICE believes it is that equally undesirable that decisions with such draconian consequences should be taken by unelected government officials. If the specification scheme is to remain, JUSTICE calls upon the Administration to amend the Ordinance to provide for an independent body to carry out that task.
4. The use of “*reasonable grounds to believe*” in the existing offence of ss. 7, 8, 9 and 10 remains objectionable for the reasons noted in the October submission. In particular, setting the intent in this provision at this low level makes arrest, charge and the institution of criminal proceedings a matter of “objective” justification

rather than classical “guilty knowledge”: see *HKSAR v Yam Ho-keung*, CACC 555 of 2001, thereby permitting the criminalisation of innocent behaviour.

5. The same objection is made to the existing s.6, which empowers the Secretary for Security to freeze property which is merely *suspected* to be “terrorist property” and the records of that property, and to the compulsory disclosure and seizure provisions in *Parts 4, 4A and 4B* proposed in the present Bill. All these provisions are open to abuse.
6. S.6 does not require there to be an existing specification by the CE under s.4, or by the Court under s.5, of a person or body as a terrorist or terrorist associate in order that the Secretary for Security may freeze a person’s property. S.6 merely requires that the Secretary has “*reasonable grounds to suspect*” that property belongs to a “terrorist” or “terrorist associate”. By s.14(5), making funds available in breach of such an order is an offence. The freezing Notice need not be gazetted.
7. The disclosure requirements of the existing s.12 and its related offence under s.14(1) of failing to disclose a suspicion of terrorist property remain objectionable. They create a “thoughtcrime”, committed even if the property in question turns out not to have been terrorist property.
8. The “gag” provision in the existing s.12(5) is in terms providing for strict liability. There is no reason why this section should not follow the formula found in its legislative model, the “gag” provision in s.25A(6) of *OSCO*, which prohibits such disclosure “*without lawful authority or reasonable excuse*”, and provides for the specific, subjective defences of lack of knowledge or suspicion of likely prejudice to the investigation.
9. The proposed *Part 4A and 4B* powers are also too wide generally and their drafting encourages abuse. The compulsory disclosure and investigation provisions do not require an existing specification or freezing order in respect of the person said to be a terrorist or terrorist associate or whose property is said to be terrorist property for

the investigation of an offence under the Ordinance. For example, it is an offence under s.8 for anybody to make "any funds or financial (or related) services" available to another person whom one "has reasonable grounds to believe" is a terrorist. An authorised officer may consider that such grounds exist but the person who has made the funds available, say for humanitarian purposes, may have other grounds to believe that the recipient is not. The officer then investigates that as "a relevant offence" under Part 4A and 4B and compulsory disclosure, etc. follows.

10. Orders obtained under ss.12A(3)(c)(ii) and (6) compel the production of material which may not be at all **relevant** to the investigation of terrorism but which only appear to the officer to "relate to" that investigation.
11. The potential for abuse of s.12D(2) and (5) is particularly obvious and plainly offends against the *Basic Law* principle of "One Country, Two Systems". Any information and material obtained under compulsion from, say, a fiduciary in relation to any person being investigated under the Ordinance, including persons **not** the subject of a specification or freezing order and including information not relevant to a terrorist offence, may be passed by any "authorised officer" to any law enforcement person or body identified as such by the Secretary for Justice, anywhere in the world, for whatever purpose, if the Secretary for Justice thinks that information will assist those foreign authorities "to discharge their functions".
12. S.12D(2)(a) permits disclosure of information obtained under ss.12A, 12B or 12C to HKSAR and foreign government bodies. However, the draft does not provide for the use of such information to make a further application or its disclosure in order that it may be shown not to provide "reasonable grounds" for belief or suspicion, even on an appeal against that order or on judicial review. The list of permitted recipients must include the Court and the person(s) the subject of that Order or application.
13. The *Part 4A* compulsory disclosure, production and search powers are available on *ex parte* application to the Court. The provisions make no reference to an affidavit

in support nor to the full and frank disclosure conditions applicable to *ex parte* applications and orders in civil cases. Without such a requirement, evidence pointing away from the commission of an offence, or against the need for the Order, may not be put before the Court.

JUSTICE

7th January 2004

Draft amendment to Section 2

"terrorist act () : -

[delete existing definition]

- (1) An act or omission which is intended to cause, in any 1 or more countries or territories, 1 or more of the outcomes specified in subsection (2), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
 - a) to induce terror in a civilian population; or
 - b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

- (2) The outcomes referred to in subsection (2) are:
 - a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
 - b) a serious risk to the health or safety of a population;
 - c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (1)(a), (b) and (d);

- d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
 - e) introduction or release of a disease-bearing organism, if likely to devastate the economy of a country or territory.
- (3) An act or omission does not fall with subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.
- (4) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person:
- a) is carrying out an act for a purpose, or with an intention, specified in subsection (1); or
 - b) intends to cause an outcome specified in subsection (2).

Compare: New Zealand 1969 No 24 s.2(1); New Zealand 1987 No 74 s.2(1); New Zealand 1987

No.179 s.2(1); Terrorism Act 2000 s.1 (UK:); Criminal Code s.83.01(1) (Canada)

Alternative Draft amendment to Section 2

“terrorist act” ()-

[delete existing definition]

(a) subject to paragraph (b), an act or omission where -

(i) the act or omission is intended to -

- (A) involves cause death or serious bodily injury by serious violence against a person;
- (B) cause serious damage to property;
- (C) endanger a person’s life, other than that of the person committing the action;
- (D) cause a serious risk to the health or safety of the public or a section of the public;
- (E) seriously to interfere with or seriously to disrupt an electronic system; or
- (F) seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and

- (ii) the use or threat is -
 - (A) intended unduly to compel the Government or to intimidate the public or a section of the public with regard to its security; and
 - (B) made for the purpose of advancing a political, religious or ideological cause;
- (b) in the case of paragraphs (a)(i), ~~(B), (E) and (F)~~, does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action;

NZ and Austrian Acts

7. Prohibition on supply of funds to terrorists and terrorist associates

(1) A person shall not provide or collect, by any means, directly or indirectly, funds with the intention that the funds should be used, in whole or in part, in order to carry out a terrorist act.

Alternative Draft Section 7

7. Financing of terrorism

(1) A person shall not directly or indirectly, wilfully and without lawful justification or reasonable excuse, provide or collect funds knowing or intending that they be used in full or in part, in order to carry out acts of a kind that, if they were carried out, would be terrorist acts.

(2) To avoid doubt, subsection (1) does not prohibit a person providing or collecting funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

NZ Act

7. Prohibition of making funds, etc. available for terrorism

No person shall directly or indirectly, collect property, provide or invite a person to provide, or make available funds or services related to finance

- (a) knowing or intending that they be used in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
- (b) knowing or intending that, in whole or part, they will be used by or will benefit [enhance the ability of] a terrorist associate [to carry out a terrorist act] .

Adapted from Canadian Act

7. Prohibition on making funds, etc. available to terrorists and terrorist associates

- (1) No person shall, except under the authority of a licence granted by the Secretary for the purposes of this section, knowingly make any funds available, directly or indirectly with the intention that the funds should be used, in whole or in part, in order to carry out a terrorist act.

- (2) To avoid doubt, subsection (1) does not make it an offence for a person to make funds available intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

Canadian and NZ Acts

Alternative Amended Section 8

8. Prohibition on making funds or financial or related services available to terrorists and terrorist associates

- (1) No person shall knowingly make available, or cause to be made available, directly or indirectly, without lawful justification or reasonable excuse, any funds either to, or for the benefit of, a person, knowing that the person is for the time being specified under this Ordinance as a terrorist or as a terrorist associate or that the funds are for the time being specified under this Ordinance as terrorist property.
- (2) To avoid doubt, nothing in subsection (1) prohibits a person making funds available, or causing property or financial or related services to be made available, either to, or for the benefit of, a movement or organisation advocating democratic government or the protection of human rights and that is not involved in any way in the carrying out of a terrorist act.
- (3) To avoid doubt, a reasonable excuse, for the purposes of subsection (1), is where the funds are made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual specified under this Ordinance.

- (4) Subsection (1) does not apply if the Secretary has, under the authority of a license granted under this section, or **under** section 5, authorised the making available of the funds or services.



Adapted from Canadian Act

10. Recruiting and membership of terrorist groups

- (1) No person shall recruit another person as a member of a group or organisation, knowing that the group or organisation is
 - (a) for the time being specified under this Ordinance as a terrorist or terrorist associate; or
 - (b) a person that carries out, or participates in the carrying out of a terrorist act.

- (2) No person shall participate in a group or organisation for the purpose stated in subsection (3), knowing that the group or organisation -
 - (a) is a person that is for the time being specified under this Ordinance Act as a terrorist or terrorist associate; or
 - (b) carries out, or participates in the carrying out of a terrorist act.

- (3) The purpose referred to in subsection (2) is to enhance the ability of any person (being a person of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, terrorist acts.

NZ

Draft amended Section 10

10. Prohibition on recruitment, etc. to person specified in notices under sections 4 and 4A

(1) A person shall not knowingly -

- (a) recruit another person to become a member of, or
- (b) become a member of

a person whom he knows to be the person specified in a notice under section 4(1) or (2) or an order made under section 5(2) published in the Gazette

(2) Where a person is a member of a person specified in a notice under section 4(1) or 4(2) or an order under Section 5(2) or 4A immediately before the date of publication in the Gazette of that notice or orders, the first-mentioned person shall, upon learning of the notice or order, take all practicable steps to cease to be such a member.

HK

12. Disclosure of knowledge or suspicion that property is terrorist property

- (1) Where a financial institution or other person in possession or control of property knows or suspects on reasonable grounds that any property is terrorist property, then the financial institution or other person shall disclose to an authorised officer the information or other matter -
 - (a) on which the knowledge or suspicion is based; and
 - (b) as soon as is practicable after that information or other matter comes to the attention of the financial institution or other person.

- (2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 6 or 7 (whether before or after the disclosure), and the disclosure relates to that fact, the person does not commit an offence under section 14(1) in respect of that contravention if -
 - (a) that disclosure is made before the person does that act and the person does that act with the consent of an authorized officer; or

- (b) that disclosure is made -
 - (i) after the person does that act;
 - (ii) on the person's initiative; and
 - (iii) as soon as it is practicable for the person to make it.

- (3) A disclosure referred to in subsection (1) -
 - (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;

 - (b) shall not render the person who made it liable in damages for any loss arising out of -
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

- (4) Where a person knows or suspects on reasonable grounds that a disclosure has been made under subsection (1), the person shall not disclose to another person any information or other matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.

- (5) Where a person knows or suspects that a disclosure has been made under subsection (1) or (4), the person shall not without lawful authority or reasonable excuse disclose to another person any information or

other matter which that person knows or suspects is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure.

CACC000555/2001

CACC 555/ 2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL NO. 555 OF 2001
(ON APPEAL FROM DCCC 621 OF 2001)

BETWEEN

HKSAR

Respondent

AND

YAM HO-KEUNG

Applicant

Coram: Hon Stuart-Moore VP, Mayo VP and Stock JA in Court

Date of Hearing: 28 August 2002

Date of Judgment: 24 October 2002

J U D G M E N T

Hon Mayo VP (giving the judgment of the Court):

1. The applicant (D4 at trial), aged 34, was convicted after a trial in the District Court before His Honour Judge Line of dealing with property knowing or having reasonable grounds to believe in whole or in part directly or indirectly represented any person's proceeds of an indictable offence contrary to section 25(1) of the Organised and Serious Crimes Ordinance, Cap. 455 (the Ordinance).
2. He seeks leave to appeal against his conviction.
3. There were three other defendants in his trial. They were charged with two conspiracies and D1 was additionally charged with two counts of being in unauthorised possession of other people's identity cards.

4. The first conspiracy referred to a conspiracy to lend money at excessive interest rates contrary to section 24(1) of the Money Lenders Ordinance, Cap. 163. The second was a conspiracy to deal with property in a similar manner to the charge which faced the applicant.

5. On the evidence which was before him the Judge convicted the applicant's co-defendants as charged.

6. The Judge made a finding of fact that during the relevant period, namely from August 1998 to April 2000, a criminal enterprise was conducted at premises at Kwai Fong Court which took the form of money lending where grossly excessive interest rates were charged.

7. Part of the *modus operandi* was to open bank accounts in the names of Miranda Chan and Yiu Yuk-lan into which payments made by borrowers would be paid. Withdrawals of moneys from these accounts would be made from ATM machines. Between July 1999 and April 2000 a total of \$2,701,600 was withdrawn from these accounts.

8. The Judge made a finding of fact that \$500,000 which had been in D1's account No. 132-30-07197-7 at the Bank of East Asia had come from the accounts of Miranda Chan and Eva Yiu Yuk-lan and that the applicant had dealt with these moneys. This fact had not been disputed and the applicant did not give evidence at the trial.

9. In a cautioned statement dated 27 April 2000 the applicant stated: "Ah Sir, it really is the case that my friend Ho Sui-yan (D1) told me to keep this sum of money temporarily for her. When required, I would return the money to her. However, I don't know how she has obtained the money".

10. The Judge was satisfied, having regard to the provisions contained in section 25 of the Ordinance, that there was sufficient evidence for the applicant to be found guilty as charged.

11. Section 25 provides:

"25. Dealing with property known or believed to represent proceeds of indictable offence.

(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.

(2) In proceedings against a person for an offence under subsection (1), it is a defence to prove that-

(a) he intended to disclose to an authorized officer such knowledge, suspicion or matter as is mentioned in section 25A(1) in relation to the act in contravention of subsection (1) concerned; and

(b) there is reasonable excuse for his failure to make disclosure in accordance with section 25A(2).

(3) A person who commits an offence under subsection (1) is liable-

(a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or

(b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(4) In this section and section 25A, references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong."

12. This application is fairly narrowly circumscribed. Although there are three separate grounds it is convenient to deal with them all together. They are as follows:

"1. The Learned Judge erred in determining that the offence under Section 25 of Cap. 455 is proved if the Prosecution only establish that a Defendant may have believed he 'may be dealing in the proceeds of an indictable offence'.

2. The Learned Judge erred in deciding in circumstances where there were a number of potential sources and/or explanations for the provenance and/or intended use of the money that he could safely infer that a reasonable man must inevitably have concluded that it was indeed the proceeds of an indictable crime.

3. The Learned Judge erred in concluding that a 'suspicion' was the same as a 'belief'."

13. The Judge proceeded upon the basis that there was insufficient evidence to prove at the appropriate level that the applicant knew that he was dealing with the proceeds of an indictable offence.

14. He considered, therefore, that what he had to determine was whether the prosecution had proved that the applicant had reasonable grounds to believe that he was dealing with such proceeds.

15. In his Reasons for Verdict, he said:

"50. To answer the question involves two stages. Firstly one asks objectively whether reasonable grounds existed for the belief. If they did then one goes on, secondly, to ask subjectively whether the defendant was aware of the existence of those reasonable grounds.

51. To be given a sum as large as \$500,000 in cash and to be asked to keep it temporarily, without further explanation, when you do not know how the money was obtained would prompt a reasonable man to ask himself

what was going on. I further judged that a reasonable man would, after only a little thought, come to the conclusion that:

- It was the proceeds of crime.
- It was for investment in crime.
- It was to be hidden from creditors.
- It was to be hidden from the taxman.
- It was to be hidden from a spouse.

There is some overlap in these categories and it may be that greater imagination may add further categories. However, I judged that in the absence of an explanation (and I stress that) these are the matters that must come to the mind of a reasonable man.

52. The fourth defendant did not give evidence. I thus have no direct evidence of what was in his mind at the time. I am obliged to infer it. He appears to be an adult of sound mind. There is no suggestion or evidence that there is anything wrong with him. In those circumstances I naturally inferred that his state of mind was the same as that of a reasonable man.

53. I thus inferred that he was aware that the explanation for his being asked to deal with so much cash had to be one or more of the above listed matters. That is because there were reasonable grounds to infer so.

54. Does the fact that there were reasonable grounds to believe a limited number of scenarios mean that the defendant did not have reasonable ground to believe in any one of them? To pose the question is really to answer it. It seems clear to me that when an event can reasonably be explained on the basis of a few grounds, the man contemplating the issue holds reasonable ground for belief in them all. By using the term 'having reasonable grounds to believe' the draftsman and the legislature clearly made a conscious departure from the old phrase 'knowing or believing'. The effect is to make the offence a wide one. It means that people who deal in cash in circumstances which produce the limited list of inferred explanations as arises here are caught by the section. Another way of putting it is that the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence yet nonetheless goes on to do it. I do not consider that such a man was not within the sights of those who promoted the Organised and Serious Crimes Ordinance." (Appeal bundle pp. 42-43)

16. The issue on this application is whether this analysis by the Judge was well founded.

17. Mr McGowan contended that it was not.

18. He submitted that when the Judge was, near the conclusion of the passage cited, referring to what a reasonable man might foresee he used the word "may" rather than the word "would". This would indicate that what the Judge had in mind was only a suspicion rather than a belief in the state of affairs.

19. Mr McGowan submitted that this was insufficient if the approach which was adopted by the High Court of Australia in **George v Rockett** 93 ALR 483 at 490 was followed:

"3. *The facts to be established.*

In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s 679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (*Homes v Thorpe* [1925] SASR 286 at 291; *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663 at 666) and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that there there are reasonable grounds for suspecting that 'there is in any house, vessel, vehicle, aircraft, or place - Anything' and that there are reasonable grounds for believing that the thing 'will ... afford evidence as to the commission of any offence'.

Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942 at 948, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):

'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as *Chambers' Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

20. Here, the court was pointing out the difference between, on the one hand, reasonable grounds to suspect, and on the other, reasonable grounds to believe. Mr McGowan's argument was that the Judge had found evidence supporting grounds for suspicion falling short of reasonable grounds to believe. There are two things which can be said about Mr McGowan's assumption that the Judge's phraseology in the passage which reads: "... the words of the section are aimed at condemning the man who reasonably foresees that he may be dealing in the proceeds of an indictable offence", revealed that suspicion, in the Judge's mind, was enough.

21. Firstly, grounds can exist to support a reasonable belief that X has happened even though X has not in fact happened. In such a situation the person who has reasonable grounds to believe that, for example, goods are stolen but who does not know that they are, may well say to himself: "I believe that I may well be dealing in goods that have been stolen, as there are good grounds for such a belief. I cannot say that I believe I am in fact dealing in stolen goods, as there are other possibilities. Yet the grounds for believing they are stolen are present." The use of the word 'may' in such a context is not inconsistent with the correct test.

22. Secondly, the criticized passage in the Reasons for Verdict must be taken in its full and proper context. We see that the Judge has correctly stated the question, namely whether there were reasonable grounds to believe. He went on correctly to specify the two questions to be asked, namely whether, objectively, reasonable grounds existed for the belief and, if so, whether subjectively the defendant was aware of the existence of those reasonable grounds. When addressing the first of these two questions the Judge concluded that a reasonable man would conclude, after only a little thought, that there were several inferences which could be drawn for which there was a reasonable factual basis. As such, the Judge was merely, again rightly in our view, saying that for each inference drawn there was a reasonable ground. It is not without importance that the Judge never used a phrase which implied that the applicant had grounds for mere suspicion and we can see no justification in Mr McGowan's concern that this is what the Judge was really saying.

23. The next question is whether the evidence supported the finding that there was a reasonable ground to believe, rather than, as Mr McGowan contended, to suspect that the \$500,000 represented the proceeds of an indictable offence. What we have in this case is the handing over of a very large sum in cash. According to the applicant's statement to the police, no explanation was given to him as to the provenance of this sum or why it was that D1 was asking him to hold onto the money temporarily. If this was correct, then

either the applicant asked no questions when questions would in innocent circumstances be asked, or if he did ask, D1 declined to answer when in innocent circumstances an answer would be given. It is also apparent from the Judge's Reasons for Verdict that within two days of the delivery of this cash to the applicant, he handed over half of it (\$250,000) to the wife of D2. Applying common sense to these facts, the finding that, objectively, there were reasonable grounds for a belief that these funds were tainted by criminality of some significance cannot in our judgment be criticized, nor the finding that the applicant was aware of those grounds.

24. Plainly, if the applicant had been the custodian of this money in innocent circumstances or felt the need to transfer some of the cash to D2, he would have been able to provide the reasons, but none emerged at the trial. The Judge was, in such circumstances, as the court said in **Li Defan and Anor v HKSAR** [2002] 1 HKLRD 527, at 540:

"perfectly entitled to regard the failure of the accused to give any explanation on oath as strengthening the inference to be drawn from the prosecution case."

In fact, as the passage cited from the Reasons for Verdict shows, the Judge felt able to draw an inference which was adverse to the applicant without using his failure to give evidence to add strength to the inference he had drawn.

25. Applying common sense to the facts of this case, the Judge's findings were not open to valid criticism.

26. The application is dismissed.

(M. Stuart-Moore)
Vice-President

(Simon Mayo)
Vice-President

(Frank Stock)
Justice of Appeal

Representation:

Mr Robert S.K. Lee, SADPP, and Mr Kelvin Lee, GC, of the Department of Justice, for the Respondent.

Mr James H.M. McGowan, assigned by the Legal Aid Department, for the Applicant.